

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Bky Case No. 02-31674
Chapter 11

Sheldahl, Inc.,

Debtor.

**MEMORANDUM OF LAW IN SUPPORT OF STEERING COMMITTEE'S
OBJECTION TO CLAIM NOS. 668 AND 691 OF THE TREASURER OF
BOULDER COUNTY, COLORADO**

INTRODUCTION

This memorandum is in support of the Steering Committee's objections to two claims filed by the Treasurer of Boulder County, Colorado (the "Objection"). The first, Claim No. 668, in the amount of \$168,891.22, was filed as a secured claim for personal property taxes assessed as of January 1, 2002. Claim No. 691 is filed as an administrative claim for real property taxes assessed as of January 1, 2003 in the amount of \$170,520.20.

A hearing on the Objection is scheduled for October 20, 2004 at 1:30 p.m.

As set forth in more detail in the Objection, both claims should be disallowed. Claim No. 668 should be disallowed for two reasons. First, the Treasurer of Boulder County, Colorado (the "Treasurer") has refused to accept tender of a portion of its collateral in satisfaction of the secured claim, contrary to the provisions of the Debtor's Confirmed Plan of Liquidation (the "Plan"). Second, the value of the personal property which is the basis of the tax is significantly less than the amount sought to be assessed by the Treasurer.

Claim No. 691 for real estate taxes is secured by real property that is no longer property of the estate. It should be disallowed as an administrative claim because the claim will be paid from the proceeds of the sale of said real property and there is no personal liability on a Colorado real estate tax lien.

DISCUSSION

Section 502 of the Bankruptcy Code provides, in pertinent part, as follows:

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects.

Bankruptcy Rule 3007 provides:

An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to the claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding.

In a prior objection, the Debtor and the Official Committee of Unsecured Creditors objected to Claim No. 380 of the Boulder County Treasurer. A Stipulation resolving that objection was approved by the Bankruptcy Court on May 6, 2004. In the Stipulation, the dispute concerning Claim No. 380 was resolved and, among other things, the parties agreed that Claim Nos. 668 and 691 were not affected. The Debtor and the Committee reserved the right to assert objections to the remaining claims of the Treasurer “including Claim Nos. 668 and 691, on any available grounds.” (See paragraph 3 of the Stipulation.)

A. Claim No. 668 – Personal Property Taxes.

1. The Treasurer Was Offered Sufficient Collateral to Satisfy its Claim.

The claim should be disallowed because the Plan provides that the secured claim of the Treasurer may be satisfied by return of its collateral of a value equal to the secured claim. The Treasurer has refused to accept the Steering Committee's offer to return such collateral in satisfaction of Claim No. 668.

The Plan, dated May 8, 2003, as modified on July 9, 2003 was confirmed by an Order of the Bankruptcy Court dated February 6, 2004 and became effective on February 16, 2004. The effect of confirmation is to bind the debtor and "any creditor" to the provisions of a confirmed plan whether or not the claim of such creditor is impaired under the plan and whether or not such creditor has accepted the plan. 11 U.S.C. § 1141(a). Similar language is contained in Article 8.2 of the Plan itself.

Claim No. 668 was filed with the Bankruptcy Court on August 11, 2003. It was designated by the Treasurer as an amendment to Claim No. 380, which was filed on July 5, 2002. On August 22, 2003, the Debtor served true and correct copies of the Amended Notice of Confirmation Hearing, the final Plan, the approved Disclosure Statement and a Ballot on the creditors and other interested parties. The Boulder County Assessor and the Boulder County Treasurer were included on the service list. Boulder County did not file an objection to the Plan and did not cast a ballot for or against the Plan. See Affidavit of James A. Rubenstein dated September 21, 2004, paragraphs 1 and 2.

The Plan defines a Secured Claim as follows:

“Secured Claim” shall mean any Claim that is secured, by a “lien”, as that term is defined in section 101(37) of the Bankruptcy Code, including, but not limited to, a “judicial lien” as that term is defined at section 101(36) of the Bankruptcy Code or a “statutory lien” as that term is defined in section 101(53) of the Bankruptcy Code, against any property of the Estate, but only to the extent of the “value”, as determined under section 506(a) of the Bankruptcy Code and Rule 3012 of the Federal Rules of Bankruptcy Procedure or as otherwise agreed to, of such Claimant’s interest in the Estate’s interest in such property.

The Plan classified secured claims in Class One. It further provides that Class One claims are not impaired and “shall be satisfied, settled and discharged, in full, in Cash from the proceeds realized from the liquidation of their collateral or return of their collateral of a value up to the allowed amount of the secured claims.” (Emphasis added.)

In accordance with the Plan, counsel to the Committee offered to return certain collateral to the Treasurer in satisfaction of the claim. This offer was made in a letter dated April 22, 2004, a copy of which is annexed to the Affidavit of James A. Rubenstein as Exhibit B. In a letter dated May 13, 2004, counsel for the Treasurer said it would not accept title to equipment in satisfaction of its claim. A true and correct copy of that letter is annexed to the Affidavit of James A. Rubenstein as Exhibit C.¹ The County’s refusal to accept equipment in satisfaction of its secured claim is contrary to its obligations under the Plan.

¹ It appears, as demonstrated in Exhibit C and other communications from Boulder County, that Boulder County was expecting funds to be set aside in an escrow account for this claim. While no specific escrow account has been located, the estate appears to have sufficient funds to pay the claim if required to do so. At no point did the Debtor or the Committee, however, waive their right to object to the claim, their right to have the

2. The Proper Amount of the Tax is a Mere Fraction of the Amount Claimed.

Claim No. 668 is a claim for a tax. The Bankruptcy Court may determine the proper amount of tax liability. Section 505 of the Bankruptcy Code, 11 U.S.C.

§ 505(a)(1) entitled “Determination of Tax Liability” states, in pertinent part, as follows:

Except as provided in paragraph (2) of this subsection, the Court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.²

As set forth in more detail in the Objection, the value upon which the Treasurer based its assessment of these taxes is grossly overstated. If an evidentiary hearing becomes necessary on this Objection, the Steering Committee will present additional testimony and evidence as to the actual value of the personal property on the date of assessment.

The Debtor’s failure to contest a state tax assessment under state law does not deprive the Debtor of its statutory right under this section to seek reassessment of the value of its property and determination of the amount of tax due. In re Piper Aircraft Corp., 171 B.R. 415, 418 (Bkrtcy. S.D. Fla. 1994).

B. Claim No. 691.

As noted in further detail in the Objection, a portion of this claim has already been paid from the proceeds of sale of one of the two real estate parcels involved. The taxes for the sold parcel have been paid. The result is a claim of

claim treated pursuant to the Plan, or their right to have the proper amount of the claim determined in the Bankruptcy Court.

\$144,726.28, secured by the remaining parcel. The remaining parcel is an idle production facility. The production facility was subject to a deed of trust securing an amount which, upon information and belief, appears to be in excess of the value of the collateral.

Claim No. 691, even as reduced, should be disallowed. The Treasurer is not entitled to an administrative expense so long as its post-petition real estate taxes are secured. In re Sylvia Development Corp., 178 B.R. 96, 98 (Bkrtcy. D. Md. 1995); see, also In re Florida Engineered Construction Products Corp., 157 B.R. 698, 700 (Bkrtcy. M.D. Fla. 1993) and In re Boston Harbor Marina Co., 157 B.R. 726, 733-736 (Bkrtcy. D. Mass. 1993).

Under Colorado law, taxes levied on real property together with interest, costs and fees, “shall be a perpetual lien thereon, and such lien shall have priority over all other liens until such taxes, delinquent interest, advertising costs, and fees shall have been paid in full.” Colorado Revised Statutes (CRS), 39-1-107. Accordingly, upon any sale of the real property subject to the tax, the taxes must be paid out of the proceeds.

If the real estate tax claim is paid as an administrative expense out of otherwise unencumbered assets of the estate, there would be a windfall to the secured creditor or its successor in interest. The undersecured creditor’s position will be improved by the elimination of this lien on the property. Following the same reasoning, an administrative expense claim for secured real property

² The exceptions referred to in paragraph 2 are (a) for determinations of a contested liability by an appropriate tribunal before commencement of the case or (b) the right of the estate to a tax refund. Neither exception is applicable here.

taxes was denied in Sylvia Development Corporation 178 B.R. 96, 97 (Bkrtcy. D. Md. 1995).

The real estate tax lien is a creature of state law. If the State of Colorado has not sought to impose personal liability for the payment of the taxes, the Bankruptcy Court should not, by granting an administrative expense, effectively impose personal liability for the secured claim.

CONCLUSION

Based upon the foregoing, it is respectfully requested that Claim Nos. 668 and 691 of the Treasurer of Boulder County, Colorado be disallowed.

Respectfully submitted,

MOSS & BARNETT
A Professional Association

Dated: September 21, 2004

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CERTIFICATE OF SERVICE

Maureen A. Montpetit, employed by Moss & Barnett, with office address of 4800 Wells Fargo Center, 90 South 7th Street, Minneapolis, MN 55402, declares that on September 21, 2004, I served the annexed:

1. Memorandum of Law in Support of Steering Committee's Objection to Claim Nos. 668 and 691 of the Treasurer of Boulder County, Colorado;
2. Affidavit of James A. Rubenstein; and
3. Certificate of Service,

upon:

Michael A. Koertje, Esq. – **Via Fax**
Assistant Boulder County Attorney
Office of the Boulder County Attorney
Post Office Box 471
Boulder, CO 80306

U.S. Trustee – **Via Fax**
1015 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Faye Knowles, Esq. – **Via Fax**
Fredrikson & Byron, P.A.
Suite 4000
200 South Sixth Street
Minneapolis, MN 55402

Sheldahl, Inc. – **Via First Class Mail**
1150 Sheldahl Road
Northfield, MN 55057

as indicated either by facsimile or U.S. Mail, a copy thereof, addressed to them at their last known address.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed: September 21, 2004

Signed: /e/ Maureen A. Montpetit
Maureen A. Montpetit